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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 61

E. S. EVANS, ET AL., PETITIONERS

v.

CHARLES E. NEWTON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The order and decree of the Superior Court of Bibb County (R. 64–66) are not reported. The opinion of the Supreme Court of Georgia (R. 81–88) is reported at 220 Ga. 280, 138 S.E. 2d 573.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on September 28, 1964 (R. 89). Rehearing was denied on October 8, 1964 (R. 92). By order of December 22, 1964, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including March 5, 1965 (R. 93). The petition was filed on that date, and granted on April 26, 1965 (R. 94; 380 U.S. 971). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

Baconsfield is a large park and recreation area established for the use of all white persons of the City of Macon, Georgia, under a charitable trust which originally (in 1911) designated the City as trustee. In 1963, the City managers of Baconsfield brought the present suit in a State court to have private trustees designated in place of the City. The purpose was to permit Baconsfield to continue operation as a facility for whites only. In the course of the action, the City resigned as trustee and the court appointed private trustees.

The question presented is whether Baconsfield, viewed in the light of its history and taking into account its public role in the community, the public incidents and effects of its operation and the extensive character of the State's involvement in its establishment and administration, is to be regarded as a public institution subject to the requirement of the Fourteenth Amendment that its use not be denied to Negroes on the basis of their race.

INTEREST OF THE UNITED STATES

The denial of equal opportunities to this country's Negro citizens is a matter of utmost national concern. The present case—involving the question whether racial discrimination in the administration of a charitable trust established to fulfill an important public purpose is beyond the reach of the Equal Protection Clause—has far-reaching implications. We deem it appropriate, therefore, to submit the views of the United States.

STATEMENT

In 1911, United States Senator Augustus O. Bacon executed a will granting a life estate, in trust, in certain designated real property known as "Baconsfield" for the benefit of his wife and two named daughters (R. 12, 18–19). Senator Bacon's will further provided that upon the death of the last surviving beneficiary, the Baconsfield property, including all remainders and reversions,

> shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control

of a Board of Managers of seven persons, at least four to be women and all seven to be white (R. 19). The Board, to be appointed by the Mayor and City Council, was given discretion to open the park to white men and white non-residents of Macon (R. 19–20), and this power has been exercised (R. 7–8). To provide for maintenance of the park, income from other described real property was to be expended by the Board of Managers (R. 20). Senator Bacon stated in his will that he was providing for a park exclusively for whites because he disapproved of the social mixing of the white and Negro races (R. 21).

This suit was brought on May 4, 1963, in the Superior Court of Bibb County, Georgia, by the individual members of the Board of Managers of Baconsfield, in their capacities as members of the Board, against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate (R. 5–10). Its purpose was to enforce the racial limitations in the will. It was alleged that the City was "failing and refusing to carry out and enforce the provisions of said Will with respect to the exclusive use" of the park by white persons (R. 8). The plaintiffs asked that the City be removed as trustee, that the court appoint new trustees and that the legal title to "Baconsfield" and any other assets held by the City of Macon as trustee under Senator Bacon's will be vested in the trustees so appointed (R. 9).

The City's answer alleged that it could not legally enforce racial segregation in the park and asked that the court construe the will and enter a decree setting forth its duties and obligations as trustee (R. 32–34). The other defendants admitted the allegations and requested the removal of the City as trustee (R. 34–35).

On May 29, 1963, six Negro citizens of the City of Macon moved for leave to file a petition for intervention on behalf of themselves and other Negroes similarly situated (R. 36). In their petition, filed on June 18, 1963, they asserted that the racial limitation was contrary to the public policy of the United States and the laws of Georgia and that the Superior Court, as an agency of the State of Georgia, could not, consistently with the Equal Protection Clause of the

Fourteenth Amendment, enter an order appointing private citizens as trustees for the purpose of regulating public property in a racially discriminatory manner (R. 40). They asked the court to effectuate the general charitable purpose of the testator to establish and endow a public park by refusing to appoint private trustees (R. 41–42).[1]

On February 5, 1964, the City filed an amendment to its answer alleging that, pursuant to a resolution adopted by the Mayor and City Council on February 4, 1964, the City had resigned as trustee. The City asked that its resignation be accepted and substitute trustees be appointed (R. 50–51). The Negro intervenors subsequently amended their petition, alleging that the Fourteenth Amendment would be violated if the relief sought by the parties was granted (R. 62–63).

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[1] On January 8, 1964, the plaintiff members of the Board of Managers filed an amendment to their original petition, requesting (1) that Negroes be enjoined from using the park, (2) that four previously unrepresented residuary legatees under Senator Bacon's will (the Sparks heirs) be added as plaintiffs, and (3) that the trustees of the Curry heirs, originally joined as defendants, be permitted to assert the interests of the Curry heirs as plaintiffs (R. 42–45). At the same time, the Sparks heirs intervened, the trustees for the Curry heirs sought leave to assert their interests as plaintiffs, and both parties joined in the original plaintiffs' prayers for relief (R. 45–49). Additionally, the Sparks heirs and the trustees for the Curry heirs asked for reversion of the trust property to the Bacon estate in the event that other relief was denied (R. 47, 49). In the decree of the Superior Court, no ruling was made on the requests that Negroes be enjoined from using the park and the conditional prayers for reversion of the trust property were held to be moot (R. 65).

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The Superior Court of Bibb County issued a decree on March 10, 1964, which, *inter alia*, (1) allowed intervention by the Negro intervenors, (2) accepted the resignation of the City of Macon as trustee of the park, and (3) appointed three individuals as new trustees (R. 64–66). The relief sought by the Negro intervenors was denied. Subsequently, all seven of the City-appointed members of the Board of Managers of "Baconsfield" submitted their resignations to the three new court-appointed trustees. The latter then reappointed three of the old Board members and appointed four new members (R. 70–72).

On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed. It held that "A. O. Bacon had the absolute right to give and bequeath property to a [racially] limited class" (R. 87); that charitable trusts are subject to the supervision of the courts (Ga. Code Ann. § 108–202); and that, since the City had resigned as trustee, the Superior Court was authorized to appoint private trustees in its place (R. 86).[2]

The record does not disclose the physical characteristics of Baconsfield. We have therefore attached at the end of our brief a recent map of the City of Macon. It is apparent from the map that Baconsfield

[2] The Supreme Court held further that, assuming the intervenors could properly raise the issue of *cy-pres*, the Superior Court had not erred in refusing to apply the doctrine to this case. The court said that "the facts * * * were wholly insufficient to invoke a ruling that the charitable bequest was or was not incapable for some reason of exact execution in the exact manner provided by the testator" (R. 87).

is one of Macon's largest parks, and its size can be estimated as about 100 acres. It is centrally located, on the banks of the Ocmulgee River, and is traversed by a major interstate highway (Route 16) as well as by several streets which connect with the public streets abutting the park.

ARGUMENT

Introduction and Summary

For many years the City of Macon and its Board of Managers served as trustee and administrator of Baconsfield. During that period, Baconsfield was, in every practical sense, a City park, and, until recently, the City entirely excluded Negroes from the park under the terms of the trust, while freely admitting all white persons who desired to use the park. In thus operating Baconsfield as a park solely for the use of white persons, the City clearly was violating the Fourteenth Amendment. It m[illegible]e no difference that the park was not owned outright by the City, but was merely administered by it under a trust containing a racial exclusion. See *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230 (the *Girard Trust* case); cf. *Guillory* v. *Administrators of Tulane University*, 203 F. Supp. 855 (E.D. La). The Fourteenth Amendment forbids a State to undertake "an obligation to enforce a private policy of racial discrimination" (*Griffin* v. *Maryland*, 378 U.S. 130, 136).

Shortly before this suit was instituted, the City of Macon began to permit Negroes to use Baconsfield. The explicit purpose of the present suit was to reverse that course of action and restore Baconsfield as a segre-

gated facility. The suit was brought in a State court by the members of the Baconsfield Board of Managers against the City and certain heirs of Senator Bacon. The plaintiffs alleged, as a basis for relief, that the City was "failing and refusing to carry out and enforce the provisions of said Will [of Senator Bacon] with respect to the exclusive use" of Baconsfield park by white persons (R. 8). The court was asked to appoint new trustees who would be obligated to exclude Negroes from the park. Six Negro citizens of Macon, who were permitted to intervene in the litigation, urged that the requested relief be denied under principles of State and federal law.

While the suit was pending, the Mayor and Council of Macon resigned as trustees of Baconsfield. Thereafter, the court entered an order accepting their resignation and appointing three new trustees to operate Baconsfield on a segregated basis. The new trustees appointed a new Board of Managers which included three members of the old board appointed by the city. On appeal to the Supreme Court of Georgia by the Negro intervenors, the lower court's order was affirmed.

The basic question thus raised in this Court is whether it is consistent with the Fourteenth Amendment for Baconsfield to be operated by the newly appointed trustees as a facility exclusively for white persons. In rejecting the intervenors' contentions below, both Georgia courts have expressly held that Baconsfield may be so operated.

The Fourteenth Amendment, in providing that "[n]o State shall * * * deny to any person within

its jurisdiction the equal protection of the laws", reaches every form of State-sponsored inequality. The question presented, therefore, cannot be resolved in favor of permitting Baconsfield to remain exclusively a white facility merely by noting that formal legal title to the park has now been transferred by the Georgia courts to trustees who are not members of the City government. As this Court has recognized on a number of occasions, formally "private" conduct may sufficiently assume the character of governmental action or may become so entwined with or dependent upon governmental actions or policies as to become subject to the constitutional limitations placed upon State action.[3] It is our position in this case that Baconsfield has thus become a public facility subject to the Fourteenth Amendment, despite the formal transfer of title and control to private trustees; the Georgia courts therefore erred in deciding that Baconsfield may be operated for the benefit of all the white citizens of Macon while Negroes are excluded.

We base our judgment upon the totality of relevant facts and circumstances bearing on the degree of State involvement, mindful of this Court's warning against attempting to formulate fixed rules or mechanical tests to measure State action in areas of mixed public action and private responsibility (*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722). Proceeding under this approach, we show that the facts and circumstances of this case demonstrate

[3] See cases cited at nn. 4 to 6, *infra*, pp. 10–11.

"State action of a particular character that is prohibited" (*Civil Rights Cases*, 109, U.S. 3, 11).

VIEWED IN THEIR TOTALITY, THE FACTORS WHICH ESTABLISH THAT BACONSFIELD SERVES A PUBLIC FUNCTION AND THAT THE STATE IS SIGNIFICANTLY INVOLVED IN THE HISTORY AND CONDUCT OF ITS OPERATIONS REQUIRE THE CONCLUSION THAT THE FOURTEENTH AMENDMENT APPLIES

In attempting to determine the point at which State involvement in an activity conducted by private persons gives the activity sufficient governmental character to bring a discriminatory practice within the ban of the Fourteenth Amendment, we look to six major factors which this Court has deemed relevant to such an inquiry: (1) the degree of State paternity and superintendence afforded the discriminating enterprise;[4] (2) the extent of direct State support and maintenance of the activity;[5] (3) the public character of the discriminating enterprise;[6] (4) the impact of the discrimination upon the affected minorities;[7] (5) the extent of State participation in, or encouragement of, the decision to discriminate;[8] and (6) the absence of a significant interest in private determination in

[4] See *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225; *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192; *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451.

[5] See *Burton* v. *Wilmington Parking Authority*, *supra*; *Pennsylvania* v. *Board of Trusts*, *supra*.

[6] See *Smith* v. *Allwright*, 321 U.S. 149; *Terry* v. *Adams*, 345 U.S. 461; *Marsh* v. *Alabama*, 326 U.S. 501.

[7] See *Shelley* v. *Kraemer*, 334 U.S. 1; *Bell* v. *Maryland*, 378 U.S. 226, 329 (dissenting opinion).

[8] See *Peterson* v. *Greenville*, 373 U.S. 244; *Lombard* v. *Louisiana*, 373 U.S. 267.

the management of the enterprise.[9] We suggest below that all of these elements are involved to a substantial degree in Baconsfield. There is thus no need to decide in this case whether any single one of them would, if present in sufficient strength, require a finding that the State is responsible for racial discrimination irrespective of the remaining considerations. The totality of circumstances showing the State's close participation in the establishment and administration of Baconsfield, as well as the public role which the park plays in the community, compels the conclusion that the Fourteenth Amendment forbids the present and any future trustees or operators of the park in its present form to exclude any person on account of his race. Cf. *Eaton* v. *Grubbs*, 329 F. 2d 710 (C.A. 4).[10]

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[9] Cf. *Civil Rights Cases*, *supra*.

[10] The question whether racial discrimination by the private trustees of Baconsfield is forbidden by the Fourteenth Amendment is fully ripe for decision by this Court in this case—as may not have been true in the second *Girard Trust* case (*Pennsylvania* v. *Board of Trusts*, 357 U.S. 570). After this Court held in its first decision (*Pennsylvania* v. *Board of Trusts*, 353 U.S. 230) that the City of Philadelphia could not, as trustee of Girard College, exclude Negroes as directed in the trust instrument, the State court appointed private trustees to replace the city. See *Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844. The Negro plaintiffs again appealed to this Court; but this time the Court, without opinion, dismissed the appeal and, treating the appeal as a petition for a writ of certiorari, denied certiorari. The reason for the Court's action in declining to review the State court's decision can only be conjectured. The Court's disposition, however, was not on the merits. The dismissal of the apepal, as in the first case, was evidently for want of jurisdiction (see *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230); and denial of certiorari, of course, imports no view of the merits. The explanation of the Court's

1. *State Paternity and Superintendence.*—A union shop agreement between a labor union and an employer—both private entities—is subject to constitutional scrutiny where federal law authorizes the making of such agreements. *Railway Employes' Dept.* v. *Hanson,* 351 U.S. 225, 231–232. Likewise, a union is forbidden to exclude Negroes where its authority to act as exclusive bargaining agent derives from federal law. *Steele* v. *Louisville & N. R. Co.,* 323 U.S. 192; *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U.S. 768. The constitutional duty of equal treatment regardless of race has also been imposed on privately owned transportation companies operating under an exclusive franchise granted and closely regulated by the State (*Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451; *Baldwin* v. *Morgan,* 287 F. 2d 750 (C.A. 5); *Boman* v. *Birmingham Transit Co.,* 280 F. 2d 531 (C.A. 5)), and upon privately owned hospitals

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action may lie in the fact that, in view of a State antidiscrimination enactment seemingly applicable to the private trustees of Girard College (Pa. Stat. Ann., Tit. 18, § 4654, expressly forbidding racial discrimination by schools), it was not clear that the private trustees would or could operate Girard on a segregated basis. It was therefore premature to complain that the appointment of the private trustees would perpetuate racial segregation. But it is entirely clear that the private trustees of Baconsfield will continue to operate the park on a segregated basis. The State courts have said they must, and there is no applicable federal law requiring them to admit Negroes. (The public accommodations provisions of the Civil Rights Act of 1964, 78 Stat. 241 *et seq.*, do not cover parks. See § 201(b)(1)–(4).) It is thus indisputable here, as it may not have been in the *Girard Trust* case, that the effect under State law of the State's action in procuring the appointment of private trustees will be to compel adherence to the racial limitation of the trust.

operating under comprehensive State plans to provide medical facilities for the State's citizens (*Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (C.A. 4), certiorari denied, 376 U.S. 938; *Eaton* v. *Grubbs,* 329 F. 2d 710 (C.A. 4)).

The primary rationale of such decisions in that the State may become so intimately involved in the creation and regulation of an enterprise as to make it (though privately owned) an agent of the State. Such an enterprise—in reality the State's creature—is not permitted to avoid the restrictions placed by the Fourteenth Amendment upon State action; nor should persons be compelled to suffer discrimination because governmental ends are thus achieved through nominally private arrangements.

The charitable trust in general, and the charitable trust for park purposes in particular, are, in Georgia as well as other States, a form of "private" enterprise bearing substantial indicia of State paternity and superintendence. In Georgia, the type of trust created by Senator Bacon—establishing a park to be operated by a municipality—is expressly authorized by statute (Ga. Code Ann. § 69–504). Georgia law additionally provides for the enforcement of charitable trusts in equity (Ga. Code Ann. § 108–201) and specially empowers the State Attorney General to enforce them (Ga. Code Ann. § 108–212 (1963 Supp.)); further, as this case shows, equity courts are empowered to appoint new trustees to prevent a charitable trust from failing. Georgia law also provides favorable rules of construction designed to up-

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hold the validity of an attempted charitable trust (Ga. Code Ann. § 108-206-09), waives the Rule Against Perpetuities (Ga. Code Ann. § 69-504; see *Regents of University System* v. *Trust Co. of Georgia*, 186 Ga. 498, 198 S.E. 345; *Pace* v. *Dukes*, 205 Ga. 835, 55 S.E. 2d 367), and grants immunity for negligent torts (*Morehouse College* v. *Russell*, 219 Ga. 717, 135 S.E. 2d 432; *Cox* v. *DeJarnette*, 104 Ga. App. 604, 123 S.E. 2d 16).

These special privileges (and others, see, *e.g.*, p. 15, *infra*) undoubtedly derive in large part from the fact that, like a municipal transit system, or a labor union having broad statutory powers, or a private hospital operating under a comprehensive State health plan, a charitable trust is typically engaged in activity in which there is a high degree of public interest. Since health, recreation, and education are among the central responsibilities of the States to their citizens, the charity hospital, the charitable park (like Baconsfield), charitable museums and libraries, and nonprofit private schools act for the State in the pursuance of public goals.[11] The State fosters private institutions of this kind, providing them with special privileges and benefits, because without such institutions the direct obligations of the State to provide for the welfare of its citizens would be expanded. Such sponsorship is a form of "interdependence" between the public and the private sectors and creates a pattern of "benefits mutually conferred" (*Burton* v. *Wil-*

[11] Sometimes in areas, like sectarian education, which the States are constitutionally barred from entering.

mington Parking Authority, 365 U.S. 715, 724–725). The State grants the charity special advantages to encourage it to assume public responsibilities. The private charity in turn assumes an essentially public function which the State might otherwise have to perform directly, and thereby acquires substantial attributes of a public rather than a private institution.

2. *State Support and Maintenance.*—This Court has said that affirmative "State support of segregated * * * [activity] through any arrangements, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command" (*Cooper* v. *Aaron*, 358 U.S. 1, 19). In this case, the State is significantly involved in the support of Baconsfield within the sense of this doctrine.

First, it grants Baconsfield, in common with other charitable trusts, exemption from taxation (see Ga. Code Ann. § 92–201), thus affording it appreciable financial assistance difficult to distinguish from an outright subsidy. "Tax exemption may attain significance when viewed in combination with other attendant state involvements." *Eaton* v. *Grubbs*, 329 F. 2d 710, 713 (C.A. 4); see *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (C.A. 4); *Simkins* v. *Moses H. Cone Memorial Hospital, supra; Guillory* v. *Administrators of Tulane University*, 203 F. Supp. 855, 863 (E.D. La.).

Second, the State has chosen and appointed the trustees who govern Baconsfield and these trustees are, in turn, answerable to the State court which ap-

pointed them and which exercises a continuing supervisory authority over the administration of the trust.

Third, for many years the City itself was the trustee. The Baconsfield of today is thus a product in substantial measure of actions taken and decisions made during the City's direct custodianship. In addition, three of the City's former park managers are members of the new Board of Managers designated by the court-appointed trustees. The close support and supervision which the City has provided have not been dissipated.

The State, in short, has not only encouraged the creation of Baconsfield to serve a public purpose, but to that end it has lent and continues to lend significant financial support and administrative supervision to the park.

3. *The Public Character of the Park.*—Even without the kind of State support and sponsorship discussed in sections (1) and (2) above, a private person or group permitted by the State to perform a function normally performed largely by government occupies a position comparable to that of a formal agency of the State.[12] Hence, the exercise of constitutionally protected rights on the public streets of a town may not be denied by a private company that owns the town and its streets; a State is not justified in "permitting a corporation to govern a community of citizens so as to restrict their fundamental liber-

[12] "When private individuals or groups are endowed by the State with powers or functions governmental in nature they become instruments of the State and subject to the same constitutional limitations as the State itself." *Baldwin* v. *Morgan, supra,* at 755, n. 9.

ties" (*Marsh* v. *Alabama*, 326 U.S. 501, 509). If the State delegates an aspect of the elective process to the control of private groups, those groups become subject to the Fifteenth Amendment. *Terry* v. *Adams*, 345 U.S. 461; *Smith* v. *Allwright*, 321 U.S. 149; *Nixon* v. *Condon*, 286 U.S. 73; *Rice* v. *Elmore*, 165 F. 2d 387 (C.A. 4). Similarly, where private real estate developers are permitted to impose systems of restrictive covenants, which have substantially the same effects as municipal zoning regulations, the State courts are forbidden to enforce racial restrictions contained in such covenants. *Shelley* v. *Kraemer*, 334 U.S. 1; *Barrows* v. *Jackson*, 346 U.S. 249; see *Bell* v. *Maryland*, 378 U.S. 226, 329 (dissenting opinion).[13]

Baconsfield is not an entire "private" community as in *Marsh* v. *Alabama*, or a large residential subdivision as in *Shelley* v. *Kraemer*. Nor is the public recreational function it serves as vital to the purposes of State government as the "private" elective process involved in *Terry* v. *Adams*, *Smith* v. *Allwright*, and

[13] The principle of the *Marsh* case has been applied in a variety of additional contexts: union activity on private company property (*Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793; *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226; *National Labor Relations Board* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147 (C.A. 6)); private colleges (*Guillory* v. *Administrators of Tulane University*, 203 F. Supp. 855, 859 (E.D. La.)); private railroad terminals (*Baldwin* v. *Morgan*, 287 F. 2d 750, 754–755 (C.A. 5)); the sidewalks of shopping centers (*Freeman* v. *Retail Clerks Local 1207*, 28 U.S. Law Wk. 2311 (Kings County Super. Ct., Washington, decided, December 9, 1959)); and private transit companies (*Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451; *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (C.A. 5)).

Nixon v. *Condon.* Nevertheless, the principle of these decisions—that a private organization which assumes a substantially governmental character must obey the restrictions placed by the Constitution upon governmental action—applies to a significant extent to Baconsfield.

(*a*) The provision of parks for the leisure and recreation of urban dwellers is a traditional function of local government. "In densely populated cities, public parks are manifestly essential to the health, comfort and pleasure of their citizens, and it is generally held that municipalities may acquire land for park purposes." 10 McQuillin, *Municipal Corporations* (3d ed.), § 28.51, p. 123. The State of Georgia explicitly authorizes its municipalities to acquire land for parks, playgrounds and other recreational purposes, and to provide for their conduct and maintenance. (Georgia Code Ann. § 69–602; see *Stubbs* v. *City of Macon,* 78 Ga. App. 237, 50 S.E. 2d 866.) Baconsfield is one of the largest parks in Macon with a distinctly public character. It is 100 acres in size and centrally located. The park contains several streets which connect with the public streets surrounding the park, and is traversed by a major highway. It is an integral part of Macon's park system; if it were closed, the city might well be forced to acquire additional park land to replace it. The existence of several privately endowed parks like it might actually dissuade a city from providing any recreational areas of its own—areas which it would, of course, be constitutionally forbidden to operate on a segregated basis.

(*b*) Apart from its physical characteristics, Baconsfield's public nature is shown by its admissions policy which—unlike that of a private activity—lacks all selectivity (except as to race) with respect to those who are permitted to use the property. There are no qualifications for participation in the use of Baconsfield's facilities, no admission fees, and no memberships or membership requirements. In contrast to a specialized recreational area sponsored by a group that has special interests which bring its members together, Baconsfield is designed to serve the entire community of Macon. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama*, 326 U.S. 501, 506.

(*c*) That Baconsfield serves a municipal function is also strongly suggested by the fact that the Mayor and the Council of Macon were designated as trustees in the trust instrument and served in that capacity for many years. Senator Bacon intended Baconsfield to be a public area serving the entire community. Presumably, it was to assure its public character and its community function that he made the City responsible for its management and control. In exercising this function, the City confirmed the municipal character of the park.

(*d*) It is now a settled principle that the lessee or operator of public property may not exclude persons

from such property on racial grounds.[14] This holds true even when the State has only bare legal title and is merely enforcing a racial limitation in a trust instrument. See *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230. It seems apparent that a vital reason behind this rule is to erase the image of discriminatory government.

Regardless of the underlying technical arrangement, the *appearance* of Baconsfield is that of a municipal facility. The City of Macon managed Baconsfield for many years. For all intents and purposes it was a municipal park; and, in appearance and character, it remains indistinguishable from other municipal parks. The appointment of private trustees has not changed this. If Baconsfield remains segregated, whatever the technicalities of the trust arrangement, it will have the appearance of a segregated public facility and be regarded as such by a substantial segment of the community.

4. *Impact upon Racial Minorities.*—One of the elements which may be weighed in assessing State involvement in nominally private discrimination is the discrimination's probable impact on the affected

[14] See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U.S. 971, reversing 202 F. 2d 275 (C.A. 6); *Derrington* v. *Plummer*, 240 F. 2d 922 (C.A. 5), certiorari denied, 353 U.S. 924; *Department of Conservation & Development* v. *Tate*, 231 F. 2d 615 (C.A. 4); *Smith* v. *Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M.D. Tenn.); *Coke* v. *City of Atlanta*, 184 F. Supp. 579 (N.D. Ga.); *Jones* v. *Marva Theatres, Inc.*, 180 F. Supp. 49 (D. Md.); *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E. D. Va.); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W. Va.).

minority. Where a "private" discriminatory arrangement has the same degree of impact upon a minority group as if such discrimination were practiced by a governmental unit, strong reasons are present for applying the standards of the Fourteenth Amendment. Undoubtedly an important factor in the Court's decision in *Shelley* v. *Kraemer*, 334 U.S. 1, p. 17, *supra*, was that racially restrictive covenants are not isolated or localized but, on the contrary, broad and far-reaching in their impact. A system of such covenants blankets a neighborhood with uniform restrictions. Its natural tendency is to create ghettos. It thereby curtails radically the opportunities of the excluded minority group, in a manner and to an extent ordinarily effected only by governmental action. See *Bell* v. *Maryland*, 378 U.S. 226, 329 (dissenting opinion); cf. *Buchanan* v. *Warley*, 245 U.S. 60. The restriction imposed has an even more pervasive character when, as in *Shelley* v. *Kraemer*, it is binding not only on one generation, but on future generations as well; communities may consequently be frozen for long periods of time along rigid racial lines. Effects so profound and enduring are, so far as the prejudiced minority is concerned, equivalent to those produced by legislative action. Clearly, their magnitude far exceeds that of *ad hoc* private discrimination.

As a major public recreational facility reserved in perpetuity for whites, Baconsfield shares important characteristics with the perpetually restricted residential community in *Shelley* v. *Kraemer*. It would be anomalous in the extreme if Baconsfield, a facility

serving a community-wide function, could constitutionally be preserved in perpetuity as a park barred to Negroes, when private owners of surrounding property are precluded by *Shelley* from enforcing racial covenants. Even more important than the impact upon Negroes of an individual public facility to which they can never have access are the wider implications if the restricted operation of Baconsfield is approved. To the extent that the white, but not the Negro, community is served by restricted facilities like Baconsfield, there is correspondingly less incentive for the community to provide adequate facilities to which Negroes would have access. If the present arrangement is permissible in Macon, what is to prevent a Baconsfield in a community where there is only one park? Or, indeed, what is to prevent the provision of other essential public services through racially restrictive private endowments, and a concomitant regression in the operation or creation of municipally owned and State-owned facilities open to Negroes?

As these questions suggest, discrimination by the establishment of a perpetual charitable facility serving a public purpose and open to all but Negroes without charge has more serious portents for the excluded minority than most forms of "private" discrimination. If Negroes are denied access to a particular commercial establishment, the forces of competition will ordinarily induce other establishments to provide the service. But if they are denied the use of free hospitals, parks, libraries, or schools, they may well end up denied access to all or substantially all such

facilities. Private enterprise will not provide such facilities; they are provided by government or by charitable endowments or not at all. Moreover, they typically require substantial capital investments and highly specialized skills and training, and few Negro communities will be able to donate the requisite funds and skills. A Negro "Baconsfield" is not a likely response to the white-only Baconsfield—even if that were a solution which could commend itself to a democratic society.

5. *State Involvement in the Decision to Discriminate.*—State discrimination within the meaning of the Fourteenth Amendment occurs whenever the State actually participates in or significantly influences private decisions to discriminate. See *Peterson* v. *Greenville,* 373 U.S. 244; *Lombard* v. *Louisiana,* 373 U.S. 267; *Robinson* v. *Florida,* 378 U.S. 153. At a number of points in the history of the Baconsfield trust, the State has thus become involved in the actual implementation of racial discrimination. To some extent, this involvement persists.

(*a*) Georgia Code Ann. § 69–504 permits any person to grant a municipal corporation lands in trust "dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance * * * [to] provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only * * *." Section 69–505 authorizes municipal corporations to accept such grants and enforce the racial limitation

by the police power. These statutes were in effect when Senator Bacon executed his will, and the language in which he created the trust was in part borrowed from § 69–504. In this sense, the present case parallels *Lombard* v. *Louisiana, supra,* where public officials encouraged private restaurants to exclude Negroes. See, also, *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 726–727 (concurring opinion).

(*b*) For many years after the establishment of Baconsfield, the City itself managed the park. During most of this period, it systematically excluded Negroes. This was unconstitutional State action. *Pennsylvania* v. *Board of Trusts,* 353 U.S. 230. More important in the present context, however, this past State action may well be directly responsible for the present status of Baconsfield. If the City had not thus unconstitutionally administered Baconsfield as a park for whites only during this long period, it is conceivable that the park, administered privately, would by this time have become an integrated facility. Or, if the failure of the City as trustee had led instead to the withdrawal of Baconsfield from public park use, the City might itself have acquired substitute park property, which it would now be compelled to make available to Negroes on a basis equal with whites (see, also, n. 15, *infra,* pp. 25–26).

(*c*) When the City realized it could no longer constitutionally exclude Negroes from Baconsfield, it began to admit them. Thereupon the Board of Managers of Baconsfield—appointed by the City and a part of the city administration—sued to procure the

appointment of private trustees who would resume the practice of exclusion. This suit, which was not prompted by any private complaint, was also State action. For, so far as appears, "but for the active intervention of the state courts, supported by the full panoply of state power," the Negro residents of Macon "would have been free to occupy the properties in question." *Shelley* v. *Kraemer*, 334 U. S. 1, 19. The clear purpose of the suit was to perpetuate racial discrimination, the gravamen of the complaint being that the City was "failing and refusing to carry out and enforce the provisions of * * * [Senator Bacon's] Will with respect to the exclusive use" of the park by white persons (R. 8). Absent the State's action here, there is strong basis to believe that Baconsfield would have been permitted to become an integrated facility through the acquiescence of all interested parties.[15]

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[15] To be sure, a beneficiary of the trust (*i.e.*, a white person who used the park) could have sued to enforce the racial limitation. See *Duffee* v. *Jones*, 208 Ga. 639, 68 S.E. 2d 699; *Dominy* v. *Stanley*, 162 Ga. 211, 133 S.E. 245; *Harris* v. *Brown*, 124 Ga. 310, 52 S.E. 610. But no such person evinced any interest in suing. A citizen or taxpayer of Macon who was not a beneficiary of the trust could not have sued (*Harris* v. *Brown*, *supra*), and we have found no Georgia case ruling that an heir or residuary legatee of the settlor may enforce a charitable trust; the general rule denies standing to the settlor, his heirs, and contributors to the trust. *Greenway* v. *Irvine's Trustee*, 279 Ky. 632, 131 S.W. 2d 705; *Leeds* v. *Harrison*, 15 N.J. Super. 82, 83 A. 2d 45. Of course, an heir may sue to set a trust aside and obtain the property himself by reversion. Cf. *Silcox* v. *Harper*, 32 Ga. 639; *Cumming* v. *Trustees of Reid Memorial Church*, 64 Ga. 105. But this is a very different matter from enforcing the trust according to its original

(*d*) The City thereafter resigned as trustee. The resolution of resignation (R. 60-61) makes clear that its action in resigning was motivated principally, if not exclusively, by a desire to perpetuate racial discrimination. Cf. *Gomillion v. Lightfoot*, 364 U.S. 339; *Griffin* v. *School Board*, 377 U.S. 218.

(*e*) The State court accepted the City's resignation and appointed private trustees to operate Baconsfield on a segregated basis. The State Supreme Court upheld the lower court's action. Cf. *Shelley* v. *Kraemer, supra.* In short, the case is one where the State, having administered Baconsfield as a segregated municipal institution for many years, has acted to transfer it to private funds in order to perpetuate segregation. In these circumstances, the State bears substantial responsibility for the racial discrimination now enforced by the trustees, albeit they are nominally a private body (see cases cited in n. 14, *supra*, p. 20).

6. *The Effect upon Private Choice.*—The *Civil Rights Cases*, 109 U.S. 3, 11, distinguished between State action subject to the Fourteenth Amendment and purely "[i]ndividual invasions of individual rights", which the Amendment does not reach. This distinction, uniformly followed (see, *e.g.*, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722),

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tenor. Faced with the prospect of losing Baconsfield to the heirs of Senator Bacon, who might close the park and use the land for other purposes, the City might decide to secure the land by condemnation—in which event it would be constitutionally required to continue to operate it on a non-segregated basis. At all events, the heirs of Senator Bacon instituted no suit, but merely joined belatedly in the suit brought by the Board of Managers.

recognizes that the Fourteenth Amendment, consistently with the spirit and institutions of American life, leaves substantial freedom for private choice in social, business, and professional activities and associations. The Amendment was not intended to raise every instance of personal or private racial discrimination to the constitutional level. Therefore, in determining its application in the disputed borderline area of joint public and private responsibility, it is relevant to consider evidence not only of affirmative State involvement, but of the absence of a substantial interest in protecting the area of truly private choice that the Amendment does not penetrate.

A finding of State action in this case would not intrude upon that area. No issue is presented here as to a property owner's right to decide whom to permit on his premises; and the only private choice effectuated by enforcing the racial limitation in the trust would be that of Senator Bacon, who died many years ago. So far as the living are concerned, Baconsfield is not a private facility used in a private way but a public facility open to all except Negroes. Even less than most commercial establishments, Baconsfield is not a place of intimate or private associations. As a public park open to all (except Negroes), it is a place of strictly transient and casual encounters. It has none of the aspects of a private home or club, where there is a compelling interest in permitting people to be free to choose those with whom to associate. Moreover, the decision to exclude Negroes was not made by

anyone using the park and, for all that appears, there was not even a complaint from the white users when the City admitted Negroes to Baconsfield.

In sum, Baconsfield is, except for its exclusion of Negroes, a truly municipal facility serving a public purpose. The State has not only created the legal framework within which such "private" charitable institutions are established to serve public functions, but it lends them its direct support. In this case, in addition, the State has been intimately involved in the actual discriminatory operation of Baconsfield: The City of Macon administered the park for many years as a facility for whites only—thus inevitably shaping its present character—and this very suit is an example of affirmative State action recently taken to preserve Baconsfield as a public facility entitled to exclude Negroes while admitting all others. The consequence of Baconsfield's continued existence as a segregated facility will be not only to deprive Negroes of equal access to public parks in Macon; there is danger that similar "private" operation of additional public facilities will deprive Negroes of other public services freely available to whites. All of these considerations, as well as the fact that Baconsfield's public character negates any substantial interest in private choice which would be adversely affected should the Fourteenth Amendment be held to apply, lead us to conclude that Baconsfield should be treated as a public institution of a governmental character re-

quired by the Constitution to admit persons without regard to their race.[16]

CONCLUSION

The judgment of the Supreme Court of Georgia, holding that the trustees of Baconsfield are legally obligated, and constitutionally permitted, to exclude Negroes on grounds of race or color, should be reversed.

Respectfully submitted.

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[16] While it is clear, if our views are accepted by the Court, that no one may operate Baconsfield as a segregated park, we think it would be premature for this Court to consider (1) whether the heirs of Senator Bacon may obtain the property by reversion and use it for non-park purposes (*e.g.*, a residential development); or (2) whether the present trustees may close the park. We note, however, that both courses of action would raise constitutional questions. As to the first, see *Guillory* v. *Administrators of Tulane University*, 212 F. Supp. 674, 687 (E.D. La.); cf. *Barrows* v. *Jackson*, 346 U.S. 249, 254; as to the second, see *Griffin* v. *School Board*, 377 U.S. 218.

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